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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~172~~ 353.

THE BARROW STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL KANE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 12, 1897.

(16,557.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 23, 1897.

1 United States Circuit Court of Appeals, Second Circuit.

Present: Wallace, Lacombe, Shipman, circuit judges.

THE BARROW STEAMSHIP COMPANY, Plaintiff in Error,
vs.
MICHAEL KANE, Defendant in Error.

Certification of Questions to the Supreme Court under the Act of March 3, 1891.

This case came before this court on March 5, 1897, upon a writ of error sued out by the defendant below to review a judgment of the U. S. circuit court, southern district of New York, in favor of the plaintiff below, defendant in error. The judgment was entered June 22, 1896, upon a verdict for $7,500 in favor of plaintiff, theretofore rendered. Argument being had upon the writ of error, certain questions of law developed, concerning which this court desires the instruction of the Supreme Court for its proper decision.

2 *Statement of Facts.*

The cause of action is for damages alleged to have been sustained in consequence of an assault upon the plaintiff, a passenger by defendant's steamship, while plaintiff was in transit under contract of transportation, by a person for whose acts it is alleged defendant was responsible. The alleged assault took place in the port of Londonderry, Ireland. The complaint is hereto annexed.

The plaintiff is a citizen and resident of the State of New Jersey. The defendant is a corporation organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland. It is a common carrier operating a line of steamships from ports in that kingdom to the port of New York. It does business in the State of New York through the firm of Henderson Bros., its regularly appointed agents, and has property therein. There is no proof of any written designation by defendant of any one within the State of New York upon whom service of process may be made. Service of the summons was made on a member of the firm of Henderson Bros. as agents for the defendant.

The New York Code of Civil Procedure provides as follows:

"SEC. 432. (Amended 1877, ch. 416.) How personal service made upon a foreign corporation.

Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, treasurer, or secretary; or, if the cor-
3 poration lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-

president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the State, as the office or residence of the person designated; and, if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this
4 section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State."

"SEC. 1780. When foreign corporation may be sued.

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

Within the time allowed defendant filed the following appearance and demurrer:

"United States Circuit Court for the Southern District of New York.

MICHAEL KANE, Plaintiff,
against
BARROW STEAMSHIP COMPANY, LIMITED, Defendant. } In Law.

5 The defendant above named, appearing herein by Henry T. Wing and Harrington Putnam, as its attorneys, specially only for the purposes hereof, as stated in its special appearance

noted herein, demurs to the complaint herein for the special purpose, and no other, until the questions herein raised have been decided, of objecting to the jurisdiction of this court, demurring and excepting to the complaint, because it appears upon the face thereof—

That the court has not jurisdiction of the person of the defendant nor of the subject-matter of the action for the reason that neither the defendant nor the plaintiff is an inhabitant or resident of the southern district of New York, and the action therefore cannot be maintained therein, and that the defendant is a foreign corporation, and the cause of action did not arise within the State of New York.

Wherefore defendant prays judgment whether this court has jurisdiction, and asks that the complaint be dismissed, with costs; but should the court overrule this demurrer and exception, defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer.

HENRY T. WING,
HARRINGTON PUTNAM,
Attorneys, Appearing Specially for the Defendant as Above Stated."

Argument being duly had upon this demurrer, the circuit court made the following decision:

6 "At a stated term of the United States circuit court for the southern district of New York, held in the United States court-house, in the Federal building, in the city of New York, on the 28th day of May, 1895.

Present: Hon. Hoyt H. Wheeler, judge.

MICHAEL KANE, Plaintiff,
vs.
BARROW STEAMSHIP COMPANY, LIMITED, Defendant.

The demurrer of the defendant herein to the complaint coming on to be heard by this court, after hearing Everett Masten, Esq., of counsel on behalf of defendant, and F. K. Pendleton, Esq., of counsel for the plaintiff, in opposition thereto—

Ordered that the demurrer of the defendant be, and the same is hereby, overruled, with costs to be adjusted by the clerk of this court, with leave to the defendant, within twenty-five days from the service of a copy of this order and a copy of the interlocutory judgment to be entered thereon, on payment of the costs as taxed by the clerk, to answer to the complaint of the plaintiff herein, and that an interlocutory judgment be entered accordingly.

HOYT H. WHEELER, *Judge.*"

Thereafter defendant answered the complaint, and the cause went to trial with the result above indicated.

7 Upon the trial, plaintiff's counsel having opened the case to the jury, counsel for defendant moved to dismiss the suit

upon the ground that it appeared upon the face of the complaint that the court had not jurisdiction thereof; that it had no jurisdiction of the person of the defendant, and that it had no jurisdiction of the subject-matter of the action, and defendant's counsel presented as grounds of said motion the same reasons as were urged as aforesaid upon the trial of the demurrer.

The court denied the motion, and defendant's counsel duly excepted thereto.

At the close of the testimony defendant again moved the court to dismiss the proceedings on the ground of want of jurisdiction both of the subject-matter and of the person of the defendant. The motion was denied and exception reserved.

The assignment of errors contains the following specifications:

"I. In that upon the hearing of the demurrer of the plaintiff in error to the complaint, made upon the ground that it appeared upon the face of the complaint that the court had not jurisdiction in the suit for the reason that the plaintiff was a resident and citizen of the State of New Jersey; that the defendant was a foreign and alien corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and that the cause of action in said Kingdom of Great Britain and Ireland *are* not within the State of New York, the court overruled said demurrer and denied
8 the motion of the plaintiff in error to dismiss the suit thereon."

"II. In that thereafter, upon the opening of the trial before the court and jury, the court denied a motion upon behalf of the plaintiff in error, duly made, to dismiss the complaint upon the ground that it appeared upon the face of the complaint that the court had not jurisdiction of the action, nor the person of the defendant, nor the subject-matter of the suit, for the reasons stated in the first assignments of error."

* * * * * * *

"V. In that the court, at the close of the case, again refused to dismiss a motion, duly made on behalf of the plaintiff in error, to dismiss the suit for want of jurisdiction, for the same reasons as stated in the first and second assignments of error."

Question Certified.

Upon the facts above set forth the question of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

"Had the circuit court jurisdiction to try the action and render judgment therein against the defendant?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, &c., the foregoing question

of law is by the circuit court of appeals for the second circuit
9 hereby certified to the Supreme Court.

Witness—

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
N. SHIPMAN, *Circuit Judge.*

April 7, 1897.

10 Circuit Court of the United States for the Southern District of New York.

MICHAEL KANE, Plaintiff,
vs.
BARROW STEAMSHIP COMPANY (LIMITED), Defendant.

The above-named plaintiff, by his attorneys, Messrs. Parrish & Pendleton, complains of the above-named defendant and respectfully shows to the court as follows:

I. Plaintiff alleges on information and belief that the above-named defendant is a corporation organized and incorporated under the laws of the Kingdom of Great Britain, and is the owner of a certain steamship known as the "Devonia," and is and was at the time hereinafter mentioned a common carrier of passengers and engaged in the business of transportation of freight and passengers upon said steamship "Devonia" and other steamers, among other places, from Londonderry, Ireland, to the city of New York, and has offices and property in the said city of New York and its general agents therein, managing the affairs of the said company within said city, and is a resident and inhabitant of the city of New York and the southern district of New York within the meaning of the statute in such case made and provided.

11 II. That the said plaintiff is a citizen of the State of New Jersey and resides at Newark, in said State; that the cause of action herein set forth is one arising between a citizen of one of the States of the United States, to wit, the State of New Jersey, and a citizen of a foreign State, to wit, an alien, within the meaning of the statute and laws of the United States, as plaintiff is advised, and involves the sum of over two thousand dollars ($2,000), exclusive of costs, and is a cause of action, as plaintiff is advised, in which, within the meaning of the laws and statutes of the United States in such case made and provided, the circuit court of the United States for the southern district of New York has jurisdiction.

III. Plaintiff further alleges upon information and belief that the said defendant operates its business, or part thereof, in and under the name and as part of the Anchor line, and its said business is in whole or in part done under that name, and its steamers, including the said "Devonia," belong to what is known as the Anchor Line steamships; that the general managers of said business in the city of New York are the firm of Henderson Brothers, who are the

general agents of said defendant, and the officers of said defendant company and said agents are at No. 7 Bowling Green and pier 54, North river, in said city; that on or about the 13th day of September, 1893, the above-named plaintiff purchased and paid for a ticket as a passenger for transportation by defendant from Londonderry, in Ireland, Kingdom of Great Britain, to the city of New
12 York, on the steamship "Devonia," belonging to said defendant, and the said defendant received the said plaintiff as a passenger and undertook and promised to transport the said plaintiff from said Londonderry to New York with due care, and to do all those things necessary and required for the safe transportation of the said plaintiff to and from said points; that it became and was its duty and it became bound to protect and save harmless the said plaintiff from any injury or harm from its agents or servants employed in its business.

IV. That said defendant violated its duty and obligation in that its servants and agents, while engaged in the service of said defendant in the transportation of said plaintiff and other passengers, needlessly and severely and wrongfully and unlawfully assaulted and maltreated said plaintiff and did him great bodily harm during said voyage, whereby he was put to great expense and was greatly and, as plaintiff fears, permanently injured; that said assault and maltreatment occurred as follows:

For the purpose of transporting passengers over part of the voyage, viz., from Londonderry to the steamship "Devonia," lying in the harbor, the said defendant used a certain tender; that said plaintiff, being a passenger on said tender, in pursuance of the obligation and promise aforesaid, the same being part of the transportation to New York, was violently, on or about September 14th, 1893, assaulted and maltreated, without just cause or excuse and wrongfully and unlawfully, by servants or agents of said
13 defendant on said tender; that one of said servants or agents was, as plaintiff is informed and believes, named Hamilton; that, among other things, plaintiff was pushed violently against the side or rail of the boat, thereby striking the lower part of his side and back against said side or rail, and the said plaintiff was in this and other respects greatly injured by the said maltreatment and assault and suffered grievous bodily harm and has had and still has great pain by reason thereof; that, among other things, plaintiff's spine and other internal organs were greatly injured, causing from time to time partial paralysis and weakness of one side of his body and pains in his leg, back, and neck. The plaintiff now is and ever since has been sick, sore, and disabled by reason of said injuries, and will doubtless continue so to be for a long time, and whether plaintiff will ever recover therefrom is doubtful; that the exact extent of said injuries and how soon, if at all, plaintiff will recover therefrom it is at present impossible to state; that plaintiff has been put to great expense by reason of his inability to attend to his business and in endeavoring to cure himself, and has already expended for that purpose a large sum, and will be put to further expense therefor; that in addition to the suffering and cost

to the said plaintiff said plaintiff was thereby injured in his business and has suffered great special damage in regard thereto; that the said plaintiff is engaged in the business of contractor, and since said injury he has been and still is unable to attend to his said business and has been obliged
14 to remain idle, owing to the injuries received and suffered by him through the said unlawful and wrongful acts of the said servants or agents of the said defendant, and has thereby alone already suffered loss and damage to the extent of five thousand dollars ($5,000), and will be unable for a long time to attend to his business, but exactly for how long plaintiff is unable to say, and will thereby be further subjected to loss and damage in that regard; that, as plaintiff believes, said agents and employees, especially said Hamilton, is a person of violent character and not a proper person to be employed in the position given him, as is and then was well known to defendant; that, despite said fact and knowledge, defendant wrongfully employed said agents and still employs them.

V. That plaintiff has suffered damage by reason of the premises to the extent of twenty thousand dollars ($20,000).

Wherefore plaintiff prays judgment against the defendant for damages in the sum of twenty thousand dollars ($20,000), besides the costs of this action, and for such other and further relief as to the court may seem just.

PARRISH & PENDLETON,
Plaintiff's Attorneys; Office and Post-office Address,
44 Broadway, New York City.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

15 Michael Kane, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

MICHAEL KANE.

Sworn to before me this 1st day of November, 1894.
CHARLES E. MANIERRE,
Notary Public, N. Y. Co.

16 UNITED STATES OF AMERICA, }
Second Circuit, } *ss.:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled The Barrow Steamship Company, plaintiff in error, against Michael Kane, defendant in error, was duly filed and entered of record in my office by order of said court on the 7th day of April, 1897, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit at the city of New York, in the southern district of the State of New York, this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED,
Clerk United States Circuit Court of Appeals for the Second Circuit.

17 [Endorsed:] U. S. circuit court of appeals, second circuit. The Barrow Steamship Company *vs.* Michael Kane. Request for instructions. United States circuit court of appeals, second circuit. Filed Apr. 7, 1897. James C. Reed, clerk.

Endorsed on cover: Case No. 16,557. U. S. C. C. of appeals, second circuit. Term No., 778. The Barrow Steamship Company, plaintiff in error, *vs.* Michael Kane. Filed April 12th, 1897.